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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WJB

DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GUY W. PARKER,

Plaintiff,

vs.

BETTY W. CLINGERMAN,

Defendant.

CASE NO. 11-cv-00328 BEN (RBB)

ORDER:

**(1) GRANTING MOTION
TO DISMISS**

**(2) DIRECTING ENTRY OF
JUDGMENT**

[Docket No. 12]

Presently before the Court is Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. (Docket No. 12.) For the reasons set forth below, the Motion to Dismiss is **GRANTED**. The complaint is **DISMISSED** without leave to amend.

BACKGROUND

This action arises from *pro se* Plaintiff Guy W. Parker's contract with the USAF/AFMC, Aeronautical Systems Center. (Notice of Removal, Exh. A [Compl., Exh. E].) According to the Complaint, Defendant Betty Clingerman signed the contract on behalf of the United States, as the "contracting officer." (*Id.*) Plaintiff alleges that Ms. Clingerman "practiced without a valid Aeronautical System Center SF1402 License in individual capacity, not under the direction of an U.S. officer, and not as a qualified Contract Officer." (*Id.*, Exh. A [Compl. ¶ 4].) Plaintiff alleges that Ms. Clingerman "committed fraud and deceit upon federal courts and this contractor [Plaintiff]" by falsely representing that she had authority to act as a contracting officer. (*Id.*, Exh. A [Compl. ¶ 3].)

1 Plaintiff initiated this action in San Diego County Superior Court. The complaint listed five
 2 causes of action: (1) constructive fraud under California Civil Code § 1573(1) & (2); (2) deceit under
 3 California Civil Code § 1709; (3) deceit under California Civil Code § 1710(2) & (3); (4)
 4 “declaratory/injunctive” under California Code of Civil Procedure § 1060; and (5) “public interest
 5 case” under California Code of Civil Procedure § 1021.5. (*Id.*, Exh. A [Compl., at 1].) The United
 6 States removed the action. (Docket No. 1.) On February 17, 2011, the United States filed a Notice
 7 of Substitution, substituting itself as Defendant in place of Clingerman. (Docket No. 5.)

8 Presently before the Court is Defendant’s Motion to Dismiss, or in the Alternative, Motion for
 9 Summary Judgment. Being fully briefed, the Court finds the Motion suitable for determination on the
 10 papers without oral argument, pursuant to Civil Local Rule 7.1.d.1.

11 DISCUSSION

12 I. MOTION TO DISMISS

13 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate if, taking all factual
 14 allegations as true, the complaint fails to state a plausible claim for relief on its face. FED. R. CIV. P.
 15 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007). Under this standard, dismissal
 16 is appropriate if the complaint fails to state enough facts to raise a reasonable expectation that
 17 discovery will reveal evidence of the matter complained of, or if the complaint lacks a cognizable legal
 18 theory under which relief may be granted. *Id.* at 556.

19 “The United States, as sovereign, is immune from suit save as it consents to be sued.” *United*
 20 *States v. Sherwood*, 312 U.S. 584, 586 (1941). The Federal Tort Claims Act (“FTCA”) constitutes a
 21 partial waiver of sovereign immunity for some tort claims against the United States when such suits
 22 are brought in compliance with the FTCA. *Lehner v. United States*, 685 F.2d 1187, 1189 (9th Cir.
 23 1982). However, the FTCA bars causes of action for fraud and deceit. *See* 28 U.S.C. § 2680(h)
 24 (listing misrepresentation, deceit, and interference with contract rights as exceptions to the limited
 25 waiver of sovereign immunity); *Owyhee Grazing Ass’n, Inc. v. Field*, 637 F.2d 694, 697 (9th Cir.
 26 1981) (“[C]laims against the United States for fraud or misrepresentation by a federal officer are
 27 absolutely barred by 28 U.S.C. § 2680(h).”).

28 In the present case, Plaintiff alleges that Ms. Clingerman, a federal employee, “practiced

1 without a valid Aeronautical System Center SF1402 License in individual capacity, not under the
 2 direction of an U.S. officer, and not as a qualified Contract Officer.” (Notice of Removal, Exh. A
 3 [Compl. ¶ 4].) Plaintiff alleges that Ms. Clingerman “committed fraud and deceit upon federal courts
 4 and this contractor [Plaintiff]” by falsely representing that she had authority to act as a contracting
 5 officer. (*Id.*, Exh. A [Compl. ¶ 3].) Plaintiff’s five causes of action—constructive fraud, deceit, deceit,
 6 declaratory/injunctive, and public interest case—are all interrelated, as they all involve allegations that
 7 Ms. Clingerman engaged in deception. Accordingly, they are all barred by the FTCA exceptions listed
 8 in 29 U.S.C. § 2680(h).

9 In opposition to the Motion, Plaintiff submitted a Notice of Response to Docket Document
 10 D12. First, Plaintiff argues that “Constitution and statutory [sic] fraud/deceit [sic] are not torts. No
 11 tort case filed, FTCA law and case law are moot.” (Pl. Opp. at 10.) On the contrary, fraud and deceit
 12 are torts, and the FTCA bars such claims against federal employees, as explained above. *See* 28 U.S.C.
 13 § 2680(h) (listing misrepresentation, deceit, and interference with contract rights as exceptions to the
 14 limited waiver of sovereign immunity); *Field*, 637 F.2d at 697 (“[C]laims against the United States
 15 for fraud or misrepresentation by a federal officer are absolutely barred by 28 U.S.C. § 2680(h).”).

16 Second, Plaintiff argues that “28 U.S.C. § 2679(b)(2)(A)(B) provides waiver.” (Pl. Opp. at 10.)
 17 Section 2679(b)(2) provides that Section 2679(b)(1)¹ does not apply to a civil action brought against
 18 an employee of the Government “(A) which is brought for a violation of the Constitution of the United
 19 States, or (B) which is brought for a violation of a statute of the United States under which such action
 20 against an individual is otherwise authorized.” This provision is not applicable here, however, as
 21 Plaintiff’s causes of action all arise under California state law, and Plaintiff does not point to any
 22 statute that would authorize this action.

23 Third, Plaintiff argues that Defendant’s Motion did not comply with local rules because
 24

25 ¹ Section 2679(b)(1) provides: “The remedy against the United States provided by sections
 26 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or
 27 resulting from the negligent or wrongful act or omission of any employee of the Government while
 28 acting within the scope of his office or employment is exclusive of any other civil action or
 proceeding for money damages by reason of the same subject matter against the employee whose
 act or omission gave rise to the claim or against the estate of such employee. Any other civil action
 or proceeding for money damages arising out of or relating to the same subject matter against the
 employee or the employee’s estate is precluded without regard to when the act or omission
 occurred.”

1 “[t]here is no D12 Motion filed for response.” (Pl. Opp. at 2.) On the contrary, Defendant properly
2 submitted a Notice of Motion as well as a Memorandum of Points and Authorities in Support of the
3 Motion in accordance with Local Rule 7.1.f.1.

4 Fourth, Plaintiff argues that Ms. Clingerman did not have authority to enter into the contract
5 at issue and did not “readily provide SF 1402 License information to the public on request.” (*Id.* at
6 5.) These arguments relating to the merits of this action are irrelevant here, as the dispositive issue is
7 whether Plaintiff’s claims are barred by the FTCA.

8 Fifth, Plaintiff argues that “5 U.S.C. §§ 701–706 agency final action order review is required.”
9 (*Id.* at 3.) Section 702 provides, “A person suffering legal wrong because of agency action, or
10 adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled
11 to judicial review thereof.” Section 702, however, does not apply when a statute—such as the FTCA
12 here—precludes judicial review. *See* 5 U.S.C. § 701(a)(1).

13 Sixth, Plaintiff argues that this action was improperly removed from state court. Whether this
14 action was properly removed from state court has already been addressed in both the Order Denying
15 Motion to Remand and Denying Motion to Remove United States as Defendant (Docket No. 11), and
16 the Order Denying Motion to Remand and Denying Reconsideration (Docket No. 14). Removal of
17 this action was proper.

18 Seventh, Plaintiff argues that the “ASBCA [Armed Services Board of Contract Appeals] lacked
19 declaratory judgment and jurisdiction.” (Pl. Opp. at 10.) This argument appears to reference Plaintiff’s
20 three previous attempts to litigate claims relating to the loss of his contract with the United States Air
21 Force before the ASBCA. *See Appeal of Guy W. Parker*, ASBCA No. 56928, 10-2 BCA ¶ 34508;
22 *Appeal of Guy W. Parker*, ASBCA No. 56928, 10-1 BCA ¶ 34416; *Appeal of Guy W. Parker*, ASBCA
23 No. 56742, 09-2 BCA ¶ 34260. Whether the ASBCA had jurisdiction over Plaintiff’s claims,
24 however, is irrelevant to the present Motion.

25 Eighth, Plaintiff argues that collateral estoppel does not bar Plaintiff’s claims. Whether
26 collateral estoppel bars Plaintiff’s claims need not be addressed here, however, as the Court decides
27 the Motion on different grounds.

28 Accordingly, the Court finds that Plaintiff’s claims are barred by the FTCA. Defendant’s
Motion to Dismiss is **GRANTED**. As this issue is dispositive, Defendant’s other arguments will not

1 be addressed. In addition, because the Motion to Dismiss is granted, Defendant's Alternative Motion
2 for Summary Judgment will not be addressed.

3 II. LEAVE TO AMEND

4 When deciding whether to grant a plaintiff leave to amend, a court considers "bad faith, undue
5 delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously
6 amended his pleadings." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). "Futility of amendment
7 can, by itself, justify the denial of a motion for leave to amend." *Id.*

8 Here, Plaintiff's claims are clearly barred by the FTCA. In addition, Plaintiff has
9 unsuccessfully litigated claims relating to the loss of his contract with the United States Air Force
10 several times before. *See Parker v. Donley*, 379 Fed. App'x 980 (Fed. Cir. 2010); *Parker v.*
11 *Clingerman*, 2009 WL 1076820 (S.D. Cal. Apr. 21, 2009); *Appeal of Guy W. Parker*, ASBCA No.
12 56928, 10-2 BCA ¶ 34508; *Appeal of Guy W. Parker*, ASBCA No. 56928, 10-1 BCA ¶ 34416; *Appeal*
13 *of Guy W. Parker*, ASBCA No. 56742, 09-2 BCA ¶ 34260. Accordingly, the Court finds that granting
14 Plaintiff leave to amend would be futile.

15 CONCLUSION

16 For the reasons stated above, the Court **GRANTS** Defendant's Motion to Dismiss. This action
17 is **DISMISSED** with prejudice. It is further ordered that the Clerk of the Court is directed to enter
18 judgment in accordance with this Order.

19
20 **IT IS SO ORDERED.**

21
22 DATED: August 2, 2011


HON. ROGER T. BENITEZ
United States District Court Judge